Peace through Law: The Hague Peace Conferences and the Rise of the *Ius contra Bellum*

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In his closing address to the First Hague Peace Conference of 29 July 1899, the Russian diplomat and conference president, Baron Egor Staal (1822-1907), evaluated the work done at The Hague. According to him the conference's significance did not lie with the First Commission, which had dealt with disarmament and failed, nor with the Second Commission, which had reached agreement over the codification of the laws and customs of war on land, but with the Third Commission, which had produced the Convention for the Pacific Settlement of Disputes. This convention, which Staal said should be labelled 'The First International Code of Peace' inaugurated 'a new era (…) in the domain of the law of nations'.[1]

Few attendants disagreed with Staal. The ambitions many had cherished for the conference with relation to the pacific settlement of disputes struck at the heart of the fabric of international law for they pertained to one of the key sovereign rights of states, namely to resort to force or war. They also formed the core of the 'peace through law' programme of the reformist, moderate side of the international peace movement.[2]

If Staal did not mince his words in hailing the work of The Hague as the beginning of a new era of the law of nations, the rest of his speech betrayed less self-gratification and more realism. Staal reiterated that the conference had not delivered all that some participants and many observers had hoped for. He underscored that the conference attained what was possible by steering a middle course between the dictates of existing international law, the concerns of governments and the ideals for change. He expressed this with a phrase that has lost little of its currency today: the conference had to conciliate 'the principle of sovereignty of states and the principle of just international solidarity'. He put a twist on the ambivalent feelings of achievement and disappointment when he called the conference a 'first step' and ended with the words: 'The good seed is sown. Let the harvest come.'[3]

Many contemporaries shared Staal's assessment of the conference as a meagre beginning but a beginning nonetheless. Similar ideas accompanied the Second Hague Peace Conference of 1907. Few expressed them as well as Elihu Root (1845-1937), the New York lawyer and United States Secretary of State, did years later when reflecting upon the progress made on the 'peace through law' agenda:

> Not only the conventions signed and ratified, but the steps taken towards conclusions which may not reach practical and effective form for many years to come, are of value. Some of the resolutions (…) do not seem to amount to very much by themselves, but each one marks on some line of progress the farthest point to which the world is yet willing to go. They are like cable ends buoyed in mid-ocean, to be picked up hereafter by some other steamer, spliced, and continued to shore (…) Each necessary step in the process is as useful as the final act which crowns the work and is received with public celebration.[4]

The same ambivalence in the assessment of the work of The Hague persists in the historiography of international law in general, and of use of force law in particular.[5] International lawyers and international legal historians consider the two Hague Conferences the two first, modest steps in the incremental process that led to the prohibition of the use of force between states, through the Covenant of the League of Nations (1919) and the Pact of Paris (1928) to the Charter of the United Nations (1945).[6] In this grand narrative, the smallness of The Hague's contribution to the process is indicated by the argument that after the First World War the work of The Hague, with its focus on arbitration and adjudication, was side-lined in preference of collective security. Although the Covenant of the League established a permanent international court – fulfilling one of the major aspirations of the 'peace through law' movement – it was superseded by the principle of collective security.[7]

The traditional historiography of international law holds to a stark contradiction between the almost complete lawlessness in relation to the right of states to resort to force and war before 1899 and its gradual restriction, to the almost complete revocation of this right, between 1899 and 1945. Even today, many international lawyers hold that the use of force law of the late nineteenth century was a veritable *ius ad bellum* in the literal sense of the phrase: that it did little but acknowledge the right of states to resort to force and war. This opposition, while highlighting the revolutionary impact of the changes wrought in the first half of the twentieth century, has also led students of the subject to consider the rise of the *ius contra bellum* to have taken place within a virtual juridical vacuum. In consequence, they acknowledge the achievements of The Hague, the Covenant, the Pact of Paris and the United Nations Charter on their own merits, or in relation to each other, but rarely in relation to the use of force law existent before 1900.

From the 1950s on, more careful students of the subject came to the uneasy conclusion that the doctrines and practices of the nineteenth century were more sophisticated.[8] Recently, a few

scholars have struck at the view that nineteenth-century *ius ad bellum* was an empty box. In his seminal legal history of warfare, Stephen Neff (2005) argued for the thickness of nineteenth-century doctrines of 'measures short of war' and for the resilience of traditional 'just war' doctrine therein.[9] In a study from 2014, Agatha Verdebout claimed that the view that international law did not impose any restrictions on the right of states to resort to war was not mainstream opinion in 1900, and that it was shared by only a few international legal scholars of the time, including Dionisio Anzilotti, Thomas J. Lawrence, Lassa Oppenheim and John Westlake. She further held that it was not reflected in state practice.[10]

This chapter argues that international law at the turn of the nineteenth century encompassed quite sophisticated rules on the use of force. These rules where deeply imbedded in a long tradition of thought and practice of *ius ad bellum* with roots in the theological, canonistic and civilian literature of the Late Middle Ages. These were further developed during the Early Modern Age (1500-1800). Although the nineteenth century wrought important changes to the *ius ad bellum*, a true understanding of use of force law is not possible without some insight in its historical tradition. This chapter holds to the view that international law at the turn of the twentieth century acknowledged that states had a right to resort to force or war, but that this right was conditioned and restricted. Taking this as its point of departure, the chapter offers an analysis of the work of The Hague in relation to the pacific settlement of disputes. The major thrust of the proponents of pacific settlement at The Hague was to promote arbitration as a means to dent the right of states to resort to force and war and set a step towards moving from a *ius ad bellum* towards a *ius contra bellum*. This chapter addresses the question how this related to and impacted on existing use of force law.

The 'peace through law' movement, arbitration and the tradition of *ius ad bellum*

The wars of the 1860s and early 1870s had thrown the international peace movement in a crisis. The 1870s and 1880s saw its reconstitution and revival. This time, the debate, which had plagued the movement during the first half of the nineteenth century, between radical utopians who rejected war under all circumstances and moderate reformers who proposed a step-by-step limitation of war and warfare, was largely resolved to the advantage of the latter.[11] Their work and ideas were abetted by the growing contribution of international lawyers.[12] By the 1890s, the international peace movement embraced a programme that put its trust in international law both to limit the chances

of war as well as the devastation wars wrought. This 'peace through law' programme was the loose amalgam of five major ideas: arms limitation and disarmament through binding treaties, the codification of international law, the humanisation of warfare through the codification of the laws and customs of war, collective security and the settlement of disputes through arbitration and other pacific means.[13] The last two points, while not mutually exclusive, represented different sensitivities and were at times upheld and defended by opposing groups within the movement. The idea of arbitration – the most legalised solution to the riddle of banning war – spearheaded the Anglo-American peace movement while its European counterpart looked more closely at collective security in the framework of European federation, an idea that had its roots in the old tradition of European peace plans.[14] By the late 1890s, the proponents of arbitration had won the ascendancy.[15] Thanks to the success of the *Alabama* arbitration between Great Britain and the United States in the early 1870s and the constant lobbying of the peace movement, arbitration also became an important point on the political agendas in the United States, Great Britain and other countries, including in Latin America.[16]

The main thrust of the arbitration movement was to offer an alternative way of settling disputes between states. The movement aspired at imposing upon states an obligation to attempt to solve their disputes through arbitration before they resorted to force or war. This would seriously dent, but not overthrow, the right of states to force or war. Such a resort would still be possible in case the arbitration attempt failed or in case one of the parties refused to implement the arbitral award. As most of the 'peace through law' movement proponents realised the introduction of a general obligation was illusive, they advocated for a careful and gradual approach.[17] The major ambition of the movement was to convince governments to make bilateral arbitration treaties, wherein they committed themselves to submit all their disputes, or at least certain categories of disputes, to arbitration – or other pacific means of dispute settlement – before resorting to force.

Ian Brownlie (1963), one of the more thoughtful scholars on the subject, suggests that the use of force doctrine of the nineteenth century was disorganised, unsystematised and failed to adequately cover the practice of states.[18] In truth, it should rather be considered the shambles of a historical tradition that were left after the bombshell of positivism blew natural law to the fringes. In order to make any sense of the confusion that was late-nineteenth-century use of force law, one needs first to return to the classical *ius ad bellum* of the Early Modern Age.

Europe's classical law of nations of the seventeenth and eighteenth centuries entailed a sophisticated *ius ad bellum*, which was constructed on two different conceptions of war. On the one hand there was the medieval tradition of 'just war'. On the other, there was formal or legal war, which had its roots in the civilian literature of the thirteenth and fourteenth centuries. Hugo Grotius (1583-1645) recycled these two traditions and gave them a place in his dualist theory of the law of nature and of nations. According to Grotius, just war pertained to natural law while legal war referred to the positivist, man-made law of nations. Whereas natural law applied only in conscience, the positive law of nations created rights and obligations in the sphere of the external relations among princes and states. Mainstream doctrine after Grotius adopted this systematisation of just and legal war.[19]

A just war is a form of self-help by a sovereign against another sovereign to enforce an existing right that has been violated. It discriminates between an unjust side, which has committed injury, and a just side, whose right has been injured. In a consequential application, this discrimination extends to both the *ius in bello* – the laws of war covering the rights and duties of the belligerents during war – as well the *ius post bellum* – the rules about the termination of war and the restoration of peace. Under the just war doctrine, only the just side may benefit from the laws of war and derive rights from its actions, such as the right to conquest, booty or ransom. At the end of a just war comes a just peace, whereby justice is done – regardless of the outcome of the war. The just belligerent receives recognition of his contested right and has a claim to compensation for all the damages and costs of the war.[20]

Legal war is a way to settle disputes about legal claims between sovereigns in the absence of a higher authority to decide the matter in an objective and neutral fashion. It grants equal rights under the laws of war to both sides as, differently from the just war, it recognises the right of both belligerents to fight the war. The outcome of the war, or of the peace negotiations following the war, determines the outcome of the dispute. The victor of the war or of the peace negotiations is granted title to the contested right.[21] Whereas, to use the metaphor by Alberico Gentili (1552-1608), legal war is similar to judgement in a civil court,[22] just war is similar to enforcement of a pre-existing right by the bailiff.

Under the dualist doctrine of the laws of nature and of nations of the European Early Modern Age, both conceptions of war had their own field of application, but they were also inextricably linked to one another. The civilians who introduced the notion of legal war

acknowledged that the conception of legal was made necessary because of human failure to discern among equal sovereigns, when both made a claim to fight a just war, who was actually in the right.[23] Whereas just war, which pertained to natural law, dictated to the conscience of sovereigns that they should only go to war for a just cause, legal war acknowledged that in the external relations between sovereigns both had a right to resort to war to settle a dispute and were treated equally under the – positive – laws of war and peace-making. While a just war needed a just cause – the violation of an existing right –, for a war to be legal, it sufficed that the belligerents were sovereign powers and that the war had been formally declared. But under this latter formalistic condition and in the connection between legal and just war, lurked another condition: namely that, for a war to be legal and the belligerents to benefit from the protection of the laws of war, a belligerent had to claim just cause. This claim did not have to be certain, but neither could it be manifestly unjust. If it was absent or manifestly unjust, there was no reason to consider both states as equally justified in taking up arms.[24] In sum, for a war to be legal all belligerents had stake a claim that they were waging a just war.

To the modern observer, the early-modern law of nations seems devoid of all restraining value since the justice of war, as a prescript of natural law, was said only to apply in conscience. But this assessment comes from a too secular reading of the normative framework of war of the sixteenth to early nineteenth centuries. Whereas natural law itself may be considered to have become secularised to some extent, the notion of obligation in conscience was not. If to the modern international lawyer, a natural obligation means an unenforceable obligation, to many scholars, rulers and diplomats of the sixteenth to early nineteenth centuries, the violation of natural law equalled sin. Through this equation, natural obligation was very much enforceable, by the supreme judge at the Final Judgment. Through reconnecting natural law to the normative frameworks of theology and in some cases canon law, the early-modern *ius ad bellum* retained strong normative value for any Christian believer. It remained a relevant determinant of behaviour – not to stop wars but to at least foster intricate attempts at justifying them – until deep into the nineteenth century. Indeed, all over the Early Modern Age, princes and governments took great care in justifying their resort to force or war explicitly, and did so using the discourse of just war.[25]

The secularisation of international relations in the nineteenth century disconnected natural law from Christian religion and undid much of the normative strength of the law of nature and of nations.[26] Whereas the discourse of natural law remained resilient deep into the nineteenth century,

by the century's final decades positivism had become ascendant and broken international law's dualist structure.[27] It seems logical that the ostracising of natural law from the realm of international law led to the demise of the just war part of the dualist logic of the old *ius ad bellum*, leaving only the recognition of the right of states to settle their disputes by force and war. But in fact, as Verdebout argued, only a very few positivist international lawyers from around 1900 took this position.[28] The majority of writers of the nineteenth and early twentieth centuries retained much of the logic of just war in their system. Rather than ostracising the logic of just war together with natural law from their system, they recycled it into their positive international law, collapsing the distinction between the justice and legality of war in the process.[29]

What were the major moves which mainstream writers of international law made during the nineteenth century with relation to use of force and war? Firstly, as explained above, natural law receded into the background, and with it the distinction between just and legal war collapsed. Elements from both historic conceptions endured and fed into a newly unified concept of the legality of war. Secondly, whereas the untying of natural law from religion undid its normative power, many authors introduced a new brake on the right of sovereign States to resort to force and war, namely statehood itself. The rights of existence, sovereignty, independence, equality and dignity, which were among the fundamental rights that were considered inherent to statehood itself, prohibited the use of force against another state for it constituted a major infringement against these rights. This relegated force and war to being an opposing right, which was also inherent to statehood but could only be resorted to by violating the fundamental rights of another state.[30] To most authors with the exception of the few 'deniers' Verdebout mentioned and some she did not, such violation needed to be justified. In short, the right of states to resort to force and war was conditional and restricted.

Mainstream doctrine provided two legitimations for force and war. Firstly, war was considered a legitimate way to settle disputes. The collapse of just and legal war into one another meant that authors did not fine-tune the distinction between war as law enforcement and war as dispute settlement. Without the context of the dualism between natural and positive law, this distinction had little relevance either way. Many doctrinal writers counselled that war could only be used as a final resort, after peaceful means had proven to be ineffective. Secondly, self-preservation allowed for the resort to force or war by states. In nineteenth-century doctrine, self-preservation grew to encompass both the conceptions of natural self-defence as well as of defensive

warfare from the classical law of nations.[31] It was expanded to the point where it covered any instance of use of force or war to ward off unwarranted attack – or an imminent threat of attack –, not only in the sense of an armed attack but also of the violation of a right, the loss of which would endanger national security or independence. In this way, much of the just war tradition of war as sanction against prior injury of right was recycled into positive international law. This was as true for war itself as for measures short of war, such as self-defence, measures of necessity, intervention or reprisal. Furthermore, the notion of self-preservation was relaxed to encompass violations of vital interests or national honour.[32] Any resort to force that was not based on one of these two arguments – war as dispute settlement or as an action to ward off an unjust enemy attack – was considered illicit. To these cases, the term 'aggression' was loosely but increasingly applied by rulers, diplomats and lawyers alike.

The general state practice of the nineteenth century showed a growing nonchalance with the demand from traditional law to formally declare war upon the enemy, but this did not imply that governments became more flippant about justifying their actions. The rise of public opinion in international relations actually dictated the opposite. A general survey of European state practice of the century before the First World War shows a remarkable resilience of just war discourses. States generally included arguments along the lines of an extended notion of self-preservation of a state's security, its rights, interests and honour in their explanations. They also showed, as if to compensate for the weakness of their argument emanating from the relaxed notion of self-preservation, a strong predilection for claiming that the enemy had used force first. [33]

Nevertheless, by the final decades of the nineteenth century, international lawyers became more critical and sceptical about the existing doctrine and practice of *ius ad bellum*. Secularisation and the demise of natural law had robbed it from much of its normative strength and left it in some disarray. Authors like Anzilotti, Lawrence, Oppenheim and Westlake reacted by throwing the towel and declaring that the law was silent in the face of the free arbiter of states to resort to war. Many turned to the peace movement and sought alternatives to war.

These were collective security and arbitration. Even if in reality they were often played out against one another by their respective proponents in the peace movement and in governments, they really conceptually complemented one another. Whereas arbitration proposed an alternative to war as a means of dispute settlement, collective security primarily albeit not exclusively proposed an alternative to force and war as a means of self-preservation.

Collective security presupposed the establishment of some kind of international community, organisation or federation which through collective action would guarantee states their vital rights, interests and honour against unwarranted attack or violation. Most plans for collective security provided for a joint body of decision-making which would settle differences between states and indicate the aggressor in case of rupture. As such, schemes for collective security often enclosed proposals for a dispute settlement mechanism which could be of a political or legal nature or both and covered the two categories of legitimate wars.

Arbitration plans were more limited in their aspirations inasmuch as the limitation of the right to wage war was concerned. Firstly, arbitration was generally only forwarded as an alternative to war to settle disputes of a legal nature and was thus only relevant for one of the two categories of war. Arbitration treaties and clauses reflected this as they generally applied to certain categories of disputes only. This was done in two different ways. Either a distinction was made between legal and political differences, with arbitration only applying to the former case. Either arbitration was excluded for matters which touched upon the vital interests and honour of one of the parties.

Secondly, arbitration schemes were accommodating towards the principle of state sovereignty on which the whole international order and its law were premised. Mainstream proponents of the 'peace through law' movement did not seek to abolish the right to wage war, but to regulate it. With arbitration, the peace movement worked within the confines of the traditional doctrine of just and legal war. This had already indicated war as the last resort in case of failure to solve the conflict by other means. Arbitration plans sought not to abolish but to restrict the right to force or war by imposing arbitration as an alternative to war. The hope of the peace movement was set on states agreeing to an obligation to submit their future disputes, or at least categories of it, to arbitration before they would resort to war. As such, they did not exclude resort to force or war in case the arbitration failed or the arbitration award was violated by one of the parties. This in fact sustained the idea of 'war as a right of last resort' as much as it aspired to limit the occasions states would refer to it. By the time of the First Hague Peace Conference, the states of Europe and America had entered into numerous commitments which imposed the duty to resort to arbitration for certain types of conflicts. This was done either through specific arbitration clauses in bilateral or multilateral treaties which committed them for issues relating to the interpretation and execution of these treaties or through special arbitration treaties which committed them for whole categories of differences.[34] Such general commitments had only proven feasible at the bilateral level. After

failure of the Pan-American Convention of 1889 – which only Brazil had ratified – a more general, multilateral convention remained a pipedream of the 'peace through law' movement.[35]

The First Hague Peace Conference (1899)

After the opening session on 18 May 1899, the delegates set about to organise the conference's work. The eight points on the agenda which the Russian government had set in its second circular of 11 February 1899 were divided among three commissions. Point 8, 'the use of good offices, mediation and voluntary arbitration in cases where they are available, with the purpose of preventing armed conflicts between nations', was entrusted to the Third Commission.[36] This point had been added to the agenda between the tsar's original call for a conference on 24 August 1898 and the second circular. The role of Professor Fedor Martens (1845-1909), a renowned international lawyer and adviser to the Russian Foreign Ministry, himself a delegate at The Hague, had been crucial in this.[37]

To many of the leading figures in the international peace movement, some of whom had turned up at The Hague, the work of the Third Commission was the nucleus of their hopes and expectations for the conference. They hoped to advance the agenda of arbitration as an alternative for war. The same went for many of the delegates who were members of the international institutions which made up the 'peace through law' movement, such as the Institut de Droit International or the Inter-Parliamentary Union.

Many of the delegation leaders as well as the international lawyers present at the conference ranked on the Third Commission. At the Commission's second meeting on 26 May 1899 it was decided to create a restricted Committee of Examination which would examine and discuss the different proposals on the table in detail and report to the Third Commission. This committee became the true battleground of the whole conference. The agenda and the composition of the committee, which was mainly staffed with lawyers some of whom had only a loose connection to their governments, allowed them a freedom to push the agenda of the 'peace through law' movement and arbitration and to go, in some cases, beyond the scope of their instructions.[38] This goes a long way towards explaining the dynamics of on the one hand having drawn-out and intense debates about far-reaching points such as compulsory arbitration and on the other seeing these ideas crumble against the reluctance of some delegations to surrender any of their state's sovereignty.

The work of the Committee of Examination centred around four proposals which the American, British and Russian delegations tabled. The main document was a Russian draft for a convention on the pacific settlement of disputes, often referred to as the 'Draft arbitral code'. The other three documents were proposals of the same three powers for the establishment of a permanent tribunal of arbitration.[39]

Taking together, these four proposals aimed at the standardisation, generalisation and institutionalisation of arbitration and other means of pacific dispute settlement. Firstly, the tsar's second circular of 11 February 1899 had set good offices, mediation and voluntary arbitration on the agenda. It mentioned that the purpose of their discussion was to enhance 'understanding in relation to their mode of application and establishment of a uniform practice in employing them'. The hope was that the standardisation of these mechanisms of dispute settlement would facilitate their use and promote them to governments when locked in a conflict. Every element or aspect of a procedure which could be regulated in advance rather than *ad hoc* when the dispute had already emerged was one less point of negotiation between the contestants and one less stumbling block to using such a mechanism.

A major purpose of the Russian proposal was to distinguish the different means of pacific dispute settlement from one another and to define them. When the international peace movement adopted arbitration and forwarded it as the spearhead of its endeavours, little clarity existed about what arbitration was. As one critic, Hans Wehberg, had it, the practice of arbitration in the nineteenth century had little to do with rendering verdict on the basis of a strict application of international law. According to him, during the first half of the nineteenth century, the term 'international arbitration' was loosely used to denote a variety of dispute settlement mechanisms. It both referred to a compromise between sovereigns imposed by a third sovereign as well mixed commissions which consisted of diplomats and jurists of both sides and which acted as commissions of inquiry to detail the facts of a dispute and negotiate towards a compromise. During the late nineteenth century, when proper arbitration panels with neutral individual members were used, these acted rather on the basis of equity than of law and did not hesitate to bend the law so as to assure compromise.[40] Even if Wehberg overstated somewhat in his desire to argue the necessity of a veritable international court over arbitration, there was a lot of confusion about what arbitration exactly entailed. The Convention for the Pacific Settlement of Disputes of 29 July 1899, which the

Third Commission produced on the basis of the Russian proposal, brought much-needed clarification.[41]

Article 15 of the convention included a definition of international arbitration, which has been considered its standard meaning ever since:

> International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for the law.

Article 16 labelled arbitration 'the most effective, and at the same time most equitable, means of settling disputes [for] questions of a legal nature'. Hereby, the convention adhered to the distinction between legal and political disputes, whereby only the former were deemed suitable for solution on the basis of law. This was an acknowledgment that international law was an incomplete legal system, consisting only of rules states had accepted themselves.[42] The definition of commissions of inquiry of Article 9 confirms the limitation of arbitration to legal disputes. It stipulates that commissions of inquiry were considered suitable for differences 'arising from a difference of opinion on points of fact' – rather than law.

The convention's title on arbitration did not specifically exclude matters touching on the vital interests or honour of states, but there was no need as submission to arbitration was promoted but not imposed by the convention.[43] The discussions in the committee and commission made clear that there was very scant support for the idea that all differences were suitable for arbitration. Whatever the personal inclination of some delegates, there was a broad consent that states would never accept to submit differences which concerned their vital interests or honour to neutral panels of arbitrators.

The definition of Article 15 demarcated arbitration also from adjudication, a distinction which would become far more relevant in later years when proposals for a true international court were debated. Whereas arbitration involved the free *ad hoc* selection of arbitrators by the parties, a court has a fixed bench of pre-appointed judges who sit in different cases, independently from the will of the parties.

One of the greatest achievements of First Hague Peace Conference was the convention's chapter 'On Arbitral Procedure'. In 28 articles, the convention lay out standard rules of procedure for arbitration panels. These rules were optional to the extent that parties to an arbitration could decide to divert from them and set their own rules.[44] But they offered them the chance to dispense

with the detailed negotiations which were generally necessary whenever they had to be established *ad hoc*. The procedure of the convention did not apply to arbitration by a head of state.[45]

Secondly, the First Hague Peace Conference carried the hope of the 'peace through law' movement that a major step forward could be set towards making arbitration mandatory for certain categories of disputes. Many in the peace movement considered this generalisation of arbitration the logical next step now that numerous states had been committing themselves to arbitration in specific treaties. The Third Commission took note of this progress through a study by Baron Edouard Descamps (1847-1933) from Belgium on recent arbitration clauses and treaties, which it decided to publish under its auspices.[46]

The original Russian proposal had included a whole range of distinctions between categories of disputes which could, should or had to be submitted to arbitration. Article 7 of the proposal called arbitration 'the most effective and at the same time most equitable means for the friendly settlement' of disputes 'concerning legal questions, and especially with regard to those concerning the interpretation and application of treaties in force'. Article 8 involved a commitment to submit these disputes to arbitration except if they concerned 'the vital interest or national honour' of the parties. This fell, however, short of a real obligation as Article 9 reserved the decision about whether a dispute was effectively submitted to arbitration or not to the states involved in the dispute. Obligatory arbitration would only apply to a very limited set of disputes. These were listed in draft Article 10, again under the exemption for vital interests and national honour. The list included disputes relating 'to pecuniary damages suffered by a state, or its nationals, as a consequence of illegal actions or negligence on the part of another state or its nationals' as well as disputes about the interpretation and application of certain categories of treaties. These covered treaties about postal and telegraphic infrastructure and services, navigation on the seas and on international rivers and interoceanic canals, intellectual property, money and measures, sanitation and veterinary surgery, phylloxera, inheritance, exchange of prisoners, reciprocal assistance in the administration of justice and technical issues relating to boundary demarcation. In early June, Professor Tobias Asser from the Netherlands submitted an extended version of Article 10, which he had prepared with other delegates.[47] Article 12 stressed that for all other matters, arbitration was strictly voluntary and had to be agreed to by all parties to the dispute.

The Russian move towards a limited form of obligatory arbitration had the support from some other delegations, chief among them that of the United States whose instructions had included

it.[48] But the proposal never stood a serious chance. Although the German member of the Committee of Examination, Professor Philipp Karl Ludwig Zorn, offered little resistance during the initial discussions in the committee in late May and early June, during its meeting on 4 July he vetoed Articles 9 and 10. He stated that the principle of general compulsory arbitration was unacceptable to the German government. It could agree with obligatory arbitration through special conventions and would maintain its commitment to existing conventions of that nature, but could go no further. Zorn argued that the establishment of the proposed Permanent Court of Arbitration would render new experience with arbitration and that it was wise to await this before new steps were taken. He appealed to the need for consent and unanimity for the other powers to accept this German rebuttal.

To the German government any proposal for obligatory arbitration was taboo as it was considered to limit the sovereignty of Germany. Moreover, it clashed with German military doctrine. This dictated that Germany needed to reserve its right for quick military action in case of conflict as it could mobilise faster than its opponents and had built its strategy on this advantage.[49] At the time of Zorn's rebuttal, an understanding had already been reached between Germany and the United States to abandon obligatory arbitration in lieu of the establishment of a permanent tribunal. From the very beginning of the conference, the American delegation realised that obligatory arbitration had little true support from the states. Moreover, neither the Russian nor the Asser list was considered worth fighting for as it mainly listed issues of small importance which were unlikely to lead to war. In the words of the French delegate Baron Henri Balluet d'Estournelles de Constant (1852-1924) the conference was in danger to 'create institutions to prevent war (…) except when war is threatened'.[50] Moreover, the American delegates had been among the first to dispute the Russian list in the Committee when they made a move to exclude navigation on international rivers and canals, which they marked as an issue of vital interest.[51]

The end result of this and related discussions on Article 1 was a watered-down text which underscored the voluntary nature of pacific dispute settlement. Article 1 of the convention went no further than a commitment by states to 'use their best efforts to insure the pacific settlement of international differences'. The term 'differences' was elected to indicate all kinds of conflicts and disputes, whatever their nature. With this article the signatory states silently affirmed the right of states to resort to war, but also confirmed the traditional notion that force and war were a last resort, after alternative means were exhausted. The convention was a list of pointers and measures to stimulate as well as facilitate the use of pacific means to settle disputes. Article 16 indicated

arbitration as the appropriate means for disputes of a legal nature. Although the phrase was barred from the final text, it was clear that disputes touching upon the vital interests and honour of states were meant to be excluded. The voluntary nature of arbitration made it unnecessary to state so expressly.

With regards mediation, the Convention moved beyond this and shifted the balance between state sovereignty and the common interest of the international community. After intense discussions, the committee and commission included a phrase in the convention to the effect of recognising a right of third powers to offer good offices or mediation, before or even during hostilities. Article 3 ruled that such an offer could never be regarded as an unfriendly act. This article, as the discussions leading to it betrayed, gave voice to the idea that war was not just a mechanism for two states to resolve a dispute but also affected the rights and interests of other states. Although the article did not restrict the right of states to resort to war, it carried the seeds of its condemnation.[52]

Thirdly, the Convention for the Pacific Settlement of Disputes provided for the establishment of a permanent tribunal of arbitration. This became the most cherished project of the stauncher proponents at the conference of the 'peace through law' agenda. The idea was first tabled by Sir Julian Pauncefote (1828-1902) from the United Kingdom. Apart from Britain, also Russia and the United States submitted drafts to endorse the idea. To the American delegation and other proponents of the 'peace through law' programme, it became quickly clear that the tribunal was the maximum they could hope for. Although many realised that its jurisdiction could be nothing but voluntary and thus the tribunal would be nothing but yet another measure to facilitate arbitration, it would be a highly visible and marketable result of the conference and hold the promise for further institutionalisation. As with obligatory arbitration, Germany opposed it. The German government feared that such a court would gain authority to propose arbitration and thus jeopardise its military strategy by delaying resort to force in case of crisis.[53] In the end, through the endeavours of the American delegation leader, Andrew White (1832-1918), Germany was brought to cede. While the argument that Germany would be held accountable for the failure of the conference by public opinion did impress the German delegation at The Hague, the German government itself was more worried about its relation to Russia, the conference's sponsor.[54]

The discussion on the different drafts for a permanent tribunal centred on the question to what extent it would resemble a regular court. The American proposal went the farthest in that

direction with the Russian the least and the British taking the middle ground. The American proposal for the appointment of judges by the high courts of the participating countries received little support. Articles 23 and 24 of the Convention for the Pacific Settlement of International Disputes laid down the final compromise about the composition of the court which was largely based on the British draft. The Convention stipulated that each member state would appoint four persons to the court. From this list, the parties in a conflict would select names to compose the particular tribunal that would arbitrate the case. At the motion of Germany, the name 'tribunal' was replaced by 'court' as the former was felt to indicate a particular panel in session and the latter was felt to be the more generic term.[55] A later German motion to bar out 'court' as well was not carried by the other participants.[56] Thus the name Permanent Court of Arbitration was accepted.

A small victory for the proponents of arbitration was the carrying of the French motion that the states would consider it their 'duty' to remind parties to a dispute of the option to use the Permanent Court. Article 27, which stipulated this, stated, in a mode similar to what was the case for mediation, that such a move was a friendly action. As with this mediation clause, the reference to duty indicated a fundamental discontent with the idea that war was a sovereign right of singular states as it impacted the rights and interests of all.[57]

The Second Hague Peace Conference (1907)

The calling of the Second Hague Peace Conference eight years after the first was a triumph for the international peace movement. Its lobbying had induced the American President Theodor Roosevelt (1858-1919) to make the suggestion for a second conference and had led to a second initiative by the Russian government.[58] The programme of the conference included 'improvements to be made in the provisions of the Convention for the pacific settlement of international disputes as regards the Court of Arbitration and international commission of inquiry'.[59] At the conference, the major issues regarding arbitration were relegated to the First Commission and its First Sub-Commission.[60]

The discussions on arbitration turned around two major issues. Firstly, there was the American proposal to establish a new international court with a fixed bench next to the existing Permanent Court of Arbitration. This was the big programmatic point of the 'peace through law' movement at the time. The idea gained support but in the end foundered on the impossibility for the great and smaller powers to agree on the composition of the bench. The Final Act of the

conference included a resolution to recommend to the powers the adoption of the draft Convention for the Creation of a Court of Arbitral Justice and to try to reach an agreement on the bench.[61] The Court's name was apt since its jurisdiction was voluntary.[62] Just as with the International Prize Court which the Second Hague Peace Conference discussed, the states failed to reach an agreement in the following years and the Court of Arbitral Justice never materialised. The Permanent Court of International Justice which was established through the Covenant of the League of Nations after the First World War was, however, largely based on the proposal of 1907.

Secondly, the conference returned to discuss obligatory arbitration. As in 1899, the delegates focused on debating a list of disputes which were considered to be suitable for obligatory arbitration. While the discussions were much more elaborate and detailed than eight years before, the idea failed in a way quite similar to 1899. Again German opposition prevented consent and caused the conference to shelve the idea. This time, the German delegation took even more care than before to explain that it did not oppose obligatory arbitration – to the contrary, it claimed to favour it – but only the means which were proposed. According to its spokesman in the First Commission, it was impractical to try and attain obligatory arbitration through a universal treaty. It would be impossible to catalogue the myriad of cases and to demarcate legal from political cases *in abstracto.* Therefore, Germany held to the gradual advance of obligatory arbitration through bilateral treaties. In this way, the experience of states could be counted in to see which cases were suitable for arbitration and which were not. In the end, the concern with unanimity carried the day and obligatory arbitration was not written into the new Convention for the Pacific Settlement of International Disputes of 18 October 1907.[63] But all was not lost this time. The Final Act of the conference endorsed the 'principle of obligatory arbitration'. The vagueness of that statement allowed both for the universal as well as the bilateral route.[64] Nevertheless, the text constituted a conceptual step towards modulating the right to resort to force and war under positive international law and truly make it a last resort.

But beyond this statement, the Second Hague Peace Conference did not make any significant progress in denting the right of states to resort to force and war through the agenda of pacific dispute settlement. It continued on the road of facilitation and only made some small gains with relation to standardisation. Its attempts at institutionalisation and generalisation failed, except in one single respect.

Following up on a resolution voted at the Pan-American Conference of Rio de Janeiro of 1906,[65] the United States submitted a proposal on the settlement of disputes for public debts. This included contract debts between governments as well as the contract debts of governments to foreign nationals. The proposal, which was made by General Horace Porter (1837-1921), was a variation on the so-called Drago Doctrine, which had been forwarded in 1902 by the then Argentinian Minister of Foreign Affairs, Luis Maria Drago (1859-1921). The doctrine, which Drago had expounded at the time in reaction to armed action by European navies against Venezuela, prohibited the use of force because of public debt. More generally, the Drago Doctrine reacted against a widespread practice by European states of using forcible reprisal against states in Latin American, Asia, the Middle East and Africa for violation of their rights by these latter states or their subjects. In fact, reprisal was a powerful instrument of European states to impose their will worldwide.[66]

The first American proposal both expanded and relaxed the Drago Doctrine. It imposed resort to arbitration for international conflicts about all kinds of public debt, both state to state – which Drago had aimed at – as well as state debts to foreign nationals. But it also relaxed the Drago Doctrine's prohibition to use force in pursuance of public debt. It stated that force could be used if an offer to arbitration was refused or went unanswered by the debtor, or if the debtor did not comply with the arbitral award.[67] The Porter proposal was hotly debated in the First Commission and the First Sub-Commission. Several states, including Argentina through its delegate Drago, opposed mandatory arbitration for state debts to private persons, invoking national sovereignty. But above all, Drago took offence at the fact that the American proposal did acknowledge the ulterior right to resort to force. His own doctrine excluded this altogether. In the end, the conference accepted an amended version of the American proposal, which became known as the Porter Convention,[68] but the two major stones of contention stayed in. Many states made reservations to these two points.[69] The Porter Convention stated that it did not apply in case arbitration was refused or the award was not complied with, but did not state directly that force would be allowed then. It was, however, the logical consequence when read against the backdrop of the existing *ius ad bellum*. Nevertheless, the Porter Convention was a major conceptual breakthrough as it imposed upon a creditor state a legal obligation to offer arbitration before resorting to force or war. Failing to do so would make use of force or war illegal under positive international law. It brought what was a vaguely defined

obligation to exhaust pacific means of dispute settlement under the just war doctrine into the realm of positive international law and transformed it into a concrete, enforceable legal obligation.

The Second Hague Peace Conference directly addressed *ius ad bellum* in one other major instance. In the Second Commission a proposal was discussed and accepted to impose the duty on belligerents to declare war upon their enemies and announce it to third powers before hostilities could be opened. The resulting Convention Relative to the Opening of Hostilities of 18 October 1907 thereby confirmed the right of states to resort to war but also pointed to the fact that reasons had to be given.[70]

Conclusion

From the moment the news of the tsar's invitation to a disarmament conference spread in the autumn of 1898, the international 'peace through law' movement reacted with, albeit guarded, enthusiasm and started to try and appropriate the initiative. The expansion of the agenda and the inclusion of arbitration in the second Russian circular note of 11 February 1899 allowed for hopes and expectations to grow. In the end, The Hague Conferences hovered between the idealism of the 'peace through law' movement, whose concerns were well represented through the important place international lawyers had on the delegations, and the realism of statesmen who had to work in a world where sovereignty was jealously guarded and formed the foundation on which the whole international order rested. To the peace movement, the best spin of the outcome of the conferences could never be anything but ambivalent: disappointing for now but promising for the future.

The answer to the question how The Hague Peace Conferences contributed to the 'revolution' of use of force law from *ius ad bellum* to *ius contra bellum* is likewise ambivalent. On the one hand, the conferences stayed largely within the confines of traditional doctrine and practice which recognised a qualified right to resort to force and war. They confirmed this right through the Convention Relative to the Opening of Hostilities and did not allow the drive for arbitration to impose any concrete duties to stop or delay states to resort to force and war, except in case of public debt, by insisting on the voluntary nature of arbitration or of any other form of pacific dispute settlement. The conferences walked the way of facilitation rather than imposition.

But, on the other hand, the conferences also exploited and concretised the restrictions which the traditional doctrines of just and legal had held. The Hague Conferences went a long way in bringing them closer to the realm of positive international law and slipping some concrete

obligations in. The duty to offer arbitration in case of conflict on public debt was the most specific and imposing one, but there was also the duty to draw attention to the Permanent Court of Arbitration, the right to offer mediation and the acceptance of the principle of obligatory arbitration at the Second Conference. There was therefore reason to hope that the conferences were a beginning, and many discussions – as the reverting hints for the need of sanction to enforce compliance with arbitral awards – showed the potential of overturning the right to resort to force and war in more fundamental ways.

Finally, the often repeated view that the Covenant of the League of Nations largely abandoned the route of The Hague and marginalised arbitration for the benefit of collective security does not fit a reading of The Hague from the perspective of the past, from traditional use of force law. The arbitration agenda as it was moulded before and at The Hague consciously addressed only half of the *ius ad bellum*, namely war as dispute resolution, and not the other half, war as self-preservation. Collective security addressed the latter. In fact, the compromise of 1919 between the British and French who focused on the former and the Americans, who focused on the latter, brought the two together in Articles 10 to 16 of the Covenant. These articles imposed an enforceable and concrete obligation to exhaust pacific means, provided for a well-defined cool-off period and opened the door to a sanction regime.[71] These were all next logical steps to the work at The Hague and most of them had been lurking behind the discussions at The Hague. Elihu Root, a great proponent of the 'peace through law' agenda, was right when he predicted in 1912 that everything that had been attained was a staging post in a long line of progress; a hunch which was shared by one of its great opponents, one who would find himself at the losing side of its history in 1919. 'It should not matter to me. But what are these childish dreams', the German Emperor Wilhelm II (1859-1941) scribbled in the margin of a report on the First Hague Peace Conference's discussions on arbitration and a permanent tribunal. 'What will it come to as time goes on', he went on giving voice to the deeper concern he felt.[72] Childish dreams could, indeed, become reality.

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[1] First Hague Peace Conference, Plenary Meeting of 29 July 1899, in J.B. Scott, ed. (1920). *The Proceedings of the Hague Peace Conferences.* New York: Oxford University Press, vol. 1. *The Conference of 1899,* pp. 224-5.

[2] The phrase 'peace through law' indicates the dominance of international law and lawyers in the international peace movement. Some leading national peace associations, such as the French or

Dutch, adopted it for their name; D. Laqua (2013). *The Age of Internationalism and Belgium, 1880-1930. Peace, Progress and Prestige.* Manchester: Manchester University Press, p. 148.

[3] Scott, *Conference of 1899*, p. 225.

[4] Quoted in P.C. Jessup (1938), *Elihu Root*. New York: Dodd, Mead & Cie., vol. 2, p. 74.

[5] E.g. G. Abi-Saab (2008). Evolution dans le règlement pacifique des différends économiques depuis la Convention Drago-Porter. In: Y. Daudet, ed., *Actualité de la Conférence de La Haye de 1907. Deuxième Conférence de la Paix/Topicality of the 1907 Hague Conference, the Second Peace Conference.* Leiden and London: Martinus Nijhoff 2008, pp. 177-96, at p. 179; I. Brownlie (1963). *International Law and the Use of Force by States.* Oxford: Clarendon Press, pp. 23-5.

[6] Brownlie, *Use of Force*, pp. 51-129; S.C. Neff (2005). *War and the Law of Nations. A General History.* Cambridge: Cambridge University Press, pp. 285-96 and 314-22.

[7] D. Cortright (2008). *Peace. A History of Movements and Ideas.* Cambridge: Cambridge University Press, pp. 49-57; F.H. Hinsley (1963). *Power and the Pursuit of Peace. Theory and Practice in the History of Relations between States.* Cambridge: Cambridge University Press, pp. 114-49; M. Koskenniemi (2008). 'The Ideology of International Adjudication and the 1907 Hague Conference. In: Daudet, *Actualité*, pp. 127-52.

[8] Brownlie, *Use of Force*, pp. 49-50.

[9] Neff, *War and the Law of Nations*, pp. 215-49.

[10] A. Verdebout (2014). The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis. *Journal on the Use of Force and International Law*, 1(2), pp. 223-46.

[11] Cortright, *Peace*, pp. 25-54; C. Lynch (2012). Peace Movements, Civil Society, and the Development of International Law. In: B. Fassbender and A. Peters, eds., *Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, pp.198-221, at pp. 203-14.

[12] M. Koskenniemi (2001). *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960.* Cambridge: Cambridge University Press, pp. 11-97.

[13] R. Lesaffer (2013). The Temple of Peace. The Hague Peace Conferences, Andrew Carnegie and the Building of the Peace Palace (1898-1913). *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht*, 140, pp. 1-38, at pp. 14-22.

[14] B. Arcidiacono (2011). *Cinq types de paix. Une histoire des plans de pacification perpétuelle (XVIIè-XXè siècles).* Paris: Presses Universitaires de France; Hinsley, pp. 13-91; K. Von Raumer

(1953). *Ewiger Friede. Friedensrufe und Friedenspläne seit der Renaissance.* Freiburg and Munich: Karl Alber.

[15] See endnote 8; also Hinsley, *Pursuit*, pp. 94-9; W.F. Kuehl (1969). *Seeking World Order. The United States and International Organization to 1920.* Nashville: Vanderbilt University Press, pp. 50-5.

[16] C.G. Roelofsen (2012). International Arbitration and Courts. In: Fassbender and Peters, *History of International Law*, pp. 145-69, at pp. 162-6.

[17] For a list of important projects and their texts, see *Documents Relating to the Program of the First Hague Conference Laid before the Conference by the Netherland Government.* Oxford/London: Clarendon Press/Humphrey Milford, 1921, pp. 73-112.

[18] Brownlie, *Use of Force*, pp. 23-50.

[19] H. Grotius (1625, text of 1646, edn. 1925). *De Iure Belli ac Pacis Libri Tres.* Classics of International Law. Oxford/London: Clarendon Press/Humphrey Milford, sections 1.3.4.1, 3.3.4-5 and 3.3.12-3.

[20] On the just war, P. Haggenmacher (1983). *Grotius et la doctrine de la guerre juste.* Paris: Presses Universitaires de France; Neff, *War and the Law of Nations*, pp. 45-68; F.H. Russell (1975). *The Just War in the Middle Ages.* Cambridge: Cambridge University Press. One of the clearest expositions of mainstream just war doctrine and its consequences from the Early Modern Age comes from E. de Vattel (1758, edn. 1916). *Le droit des gens ou principes de la loi naturelle.* Classics of International Law. Oxford/London: Clarendon Press/Humphrey Milford 1916, esp. section 4.2.18.

[21] J.Q. Whitman (2012). *The Verdict of Battle. The Law of Victory and the Making of Modern War.* Cambridge, MA and London: Harvard University Press.

[22] A. Gentili (1598, text of 1612, edn. 1933). *De Iure Belli Libri Tres.* Classics of International Law. Oxford/London: Clarendon Press/Humphrey Milford, section 1.6.47-52.

[23] Gentili, *De Iure Belli*, 1.6.47-52; see also Vattel, *Le droit des gens*, 3.3.40.

[24] W. Rech (2013). *Enemies of Mankind. Vattel's Theory of Collective Security.* Leiden and Boston: Martinus Nijhoff.

[25] Bernd Klesmann (2007). *Bellum Solemne. Formen und Funktionen europäischer Kriegserklärungen des 17.* Jahrhunderts; Mainz: Philipp von Zabern; A. Tischer (2012). *Offizielle*

Kriegsbegründungen in der frühen Neuzeit. Hersscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständniss. Berlin: Lit 2012.

[26] H. Steiger (2001). From the International Law of Christianity to the International Law of the World Citizen: Reflections on the Formation of the Epochs of the History of International Law. *Journal of the History of International Law,* 3(2), pp. 180-93.

[27] M. Koskenniemi (2005). *From Apology to Utopia. The Structure of International Legal Argument*, 2nd edn. Cambridge: Cambridge University Press, pp. 122-57; C. Sylvest (2004). International Law in Nineteenth-Century Britain. *British Yearbook of International Law,* 75, pp. 9-70.

[28] Verdebout, Use of Force in the Nineteenth Century, p. 224.

[29] The analysis of nineteenth- and early twentieth-century doctrine is based on the reading of over 40 textbooks of international law from the period.

[30] E.g. J.L. Klüber (1861). *Droit des gens moderne de l'Europe avec un supplément contenant une bibliothèque choisie du droit des gens,* ed. M.A. Ott. Paris: Librairie de Guillaumin et Cie.

[31] Self-defence was a natural right to use proportional force to stop an unjust armed attack. Defensive war was a full war which was justified by the enemy's unjust armed attack. Neff, *War and the Law of Nations,* pp. 126-30.

[32] Brownlie, *Use of Force,* pp. 40-52; Neff, *War and the Law of Nations,* pp. 215-49; Verdebout, Use of Force in the Nineteenth Century, pp. 227-34.

[33] Russian declaration of war against the Ottoman Empire of 26 April 1828, *British Foreign and State Papers* (1842). London: HMSO 1842, vol. 15, pp. 656-62; declaration of Queen Victoria announcing the war against Russia on 27 March 1854, 44 *British Foreign and State Papers*, p. 110; also see for the First World War, *Collected Diplomatic Documents Relating to the Outbreak of the European War*. London: Foreign Office, 1915.

[34] A list was tabled at the First Hague Conference, General Survey of the Clauses of Mediation and Arbitration Affecting the Powers Represented at the Conference, in Scott, *Conference of 1899*, pp. 191-206.

[35] Hinsley, *Pursuit,* pp. 267-8.

[36] Russian Circular Note Proposing the Programme of the First Conference, 11 February 1899, in Shabtai Rosenne, ed. (2001). *The Hague Peace Conferences of 1899 and 1907 and International Arbitration. Reports and Documents.* The Hague: Asser Press, pp. 24-6, at p. 25.

[37] V.V. Pustogarov (2000). *Our Martens. F.F. Martens, International Lawyer and Architect of Peace.* The Hague, London and Boston: Kluwer Law International, pp. 162-7.

[38] For the debates and decisions of the Conference, C. DeArmond Davis (1962). *The United States and the First Hague Peace Conference.* Ithaca, NY: Cornell University Press; A. Eyffinger (s.d.). *The 1899 Hague Peace Conference. 'The Parliament of Man, the Federation of the World.* The Hague, London and Boston: Kluwer Law International; F.W. Holls (1914). *The Peace Conference at The Hague and its Bearings on International Law and Policy.* London: Macmillan; Scott, *Conference of 1899*; A.D. White (1905). *Autobiography of Andrew Dickson White with Portraits.* London: Macmillan & Cie., vol. 2.

[39] For the text of these documents, see the Report of the Third Commission to the Plenary Conference, 25 July 1899 in Scott, *Conference of 1899*, pp. 106-206, at pp. 166-89.

[40] H. Wehberg (1918). *The Problem of an International Court of Justice.* Oxford/London: Clarendon Press/Humphrey Milford, pp. 13-22.

[41] For the text of the Convention, Clive Parry, ed. (1969-1981). *The Consolidated Treaty Series.* Dobbs Ferry: Oceana Press, vol. 184, p. 410, hereinafter 184 CTS 410.

[42] H. Lauterpacht (1933). *The Function of Law in the International Community;* Oxford: Clarendon Press.

[43] Art. 17.

[44] Art. 30.

[45] Art. 33.

[46] First meeting of the Third Commission of 23 May 1899, in Scott, *Conference of 1899*, pp. 581-2.

[47] See fifth meeting of the Committee of 7 June 1899, in Scott, *Conference of 1899*, p. 705.

[48] Davis, *First Hague Peace Conference*, p. 137.

[49] E.T.S. Dugdale, ed. (1930). *German Diplomatic Documents 1871-1914*. London: Methuen & Cie., vol. 3, esp. pp. 74-81. The military argument surfaced in the discussion whether mediation would delay mobilisation. See Art. 7 of the Convention for the Pacific Settlement of International Disputes; third meeting of the Committee, 31 May 1899, amendment by Italy, in Scott, *Conference of 1899*, p. 696. Also see White, *Autobiography*, vol. 2, p. 265.

[50] Thirteenth Meeting of the Committee, 3 July 1899, in Scott, *Conference of 1899*, p. 760.

[51] Fourth meeting of the Committee, 3 June 1899, in *Scott, Conference of 1899*, p. 702; Davis, *First Hague Peace Conference,* pp. 137-60; Holls, *Peace Conference,* p. 228; White, *Autobiography*, vol. 2, pp. 265-328

[52] Second meeting of the Committee, 29 May 1899, in *Scott, Conference of 1899*, pp. 688-94.

[53] Count Münster to German Chancellor, 12 June 1899, in Dugdale, *German Diplomatic Documents*, vol. 3, p. 76.

[54] Dugdale, *German Diplomatic Documents*, vol. 3, pp. 74-81.

[55] Twelfth meeting of the Committee, 1 July 1899, in Scott, *Conference of 1899*, p. 755.

[56] Fifteenth meeting of the Committee, 15 July 1899, in Scott, *Conference of 1899*, pp. 775-7.

[57] Thirteenth meeting of the Committee, 3 July 1899, in Scott, *Conference of 1899*, pp. 759-64.

[58] C. DeArmond Davis (1975). *The United States and the Second Hague Peace Conference. American Diplomacy and International Organization 1899-1914.* Durham, NC: Duke University Press; A. Eyffinger (1907). *The 1907 Hague Peace Conference. 'The Conscience of the Civilized World'.* The Hague: JuciCap, pp. 62-80; Kuehl, *Seeking World Order*, pp. 59-97.

[59] Letter of the Russian ambassador to the US Secretary of State, 3 April 1906, in Rosenne, *Hague Peace Conferences*, p. 147.

[60] For the proceedings and documents, see J.B. Scott (1920-1921). *The Proceedings of the Hague Peace Conferences. Translation of the Official Texts, The Conference of 1907.* Oxford: Oxford University Press, 3 vols.; for the First Commission, vol. 2 (1921).

[61] Final Act of the Second International Peace Conference, 18 October 1907, in Scott, *Conference of 1907*, vol. 1, pp. 679-90, at p. 689; Draft Convention Relative to the Creation of a Court of Arbitral Justice, in *Ibidem,* vol. 1, pp. 690-6.

[62] Art. 17 of the Draft Convention.

[63] 205 CTS 233.

[64] Davis, *Second Hague Peace Conference*, pp. 251-7.

[65] J.W. Gantenbein (s.d.). *The Evolution of our Latin-American Policy. A Documentary Record.* New York: Columbia University Press, pp. 717-8; Jessup, *Root,* vol. 2, pp. 68-75.

[66] W. Benedek (2012). Drago-Porter Convention. In: R. Wolfrum, ed., *Max Planck Encyclopedia of Public International Law.* Oxford: Oxford University Press, vol. 3, pp. 234-6; Neff; *War and the Law of Nations*, pp. 225-39. On the Drago Doctrine, A. Hershey (1907). The Calvo and Drago Doctrines. *American Journal of International Law,* 1(1), pp. 26-45.

[67] Scott, *Conference of 1907*, vol. 2, p. 906.

[68] Convention respecting the Limitation of the Employment of Force for Contract Debts, 18 October 1907, 205 CTS 250.

[69] Scott, *Conference of 1907*, vol. 2, pp. 137-42, 226-31 and 300-10.

[70] 205 CTS 263; Davis, *Second Hague Peace Conference*, pp. 202-11.

[71] R. Kolb, ed. (2015). *Commentaires sur le Pacte de la Société des Nations.* Brussels: Bruylant; P.J. Yearwood (2009). *Guarantee of Peace. The League of Nations in British Policy 1914-1925.* Oxford: Oxford University Press, pp. 7-137; A. Zimmern (1939). *The League of Nations and the Rule of Law 1918-1935*, 2nd edn. London: Macmillan, pp. 138-253.

[72] Foreign Minister to Emperor, 21 June 1899, in Dugdale, *German Diplomatic Documents*, vol. 3, p. 80.